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Federal Communications Commission
Office of the Secretary

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

OF

In the Matter of

Review of the Policy Implications of the Changing Video Marketplace

MM Docket No. 91-221

# COMMENTS OF NATIONAL BROADCASTING COMPANY, INC.

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## SUMMARY

In June, 1991, the Commission's Office of Plans and Policy issued a report on the changing competitive position of television stations and networks over the past decade and on the competitive challenges these once-dominant broadcast services face in the 1990's. OPP concluded that the past and future competitive trends it had documented raised serious implications for the continued validity of Commission rules that "prevent broadcasters from adopting more efficient forms of organization and offering services the public would value." OPP also concluded that "[r]elaxing or eliminating such rules would allow broadcasters to compete more effectively and would facilitate the continued provision of valued over-the-air services."

The trends OPP describes in its report alone should raise grave concerns about the future of free over-the-air television. Today NBC is presenting the Commission with new data that shows that in just the few months since the OPP issued its report, the competitive trends in broadcast audiences, revenues and profits described by OPP that demand regulatory change are accelerating at an even faster pace than OPP predicted. If the Commission cares about maintaining a strong and vibrant national and local free broadcast system, in light of this new data it must act quickly and decisively to acknowledge what is happening to broadcasters in the marketplace, and to craft a regulatory framework that allows

broadcasters to evolve and change in response to changes in technology and the marketplace.

Even on the basis of what has turned out to be an overly optimistic view of the relative competitive position of broadcasting in the 1990's, OPP recommended the elimination of Commission regulations that prevent networks and stations from competing against, and pursuing the same marketplace opportunities as, unregulated media. As 1991 unfolds, the battle for audiences and revenues has become more fierce, the need to eliminate these unfair and discriminatory restrictions is becoming increasingly urgent. The Commission must put this proceeding on the fastest possible track. If government regulations do not allow broadcasters to compete effectively in the marketplace of the 1990's, the government will bear the responsibility for undermining the free over-the-air broadcast system which has served the Nation for 40 years.

Because of the radical changes in the marketplace that have forever altered the competitive position of broadcasters, many of the Commission's regulations -- which may have been justified when initially adopted decades ago -- are today unnecessary and threaten the competitive health of free, over-the-air television. Such regulations include:

- The rule that prohibits national broadcast networks from owning cable systems;

- The rule that prohibits a single entity from operating more than one simultaneous over-the-air broadcast network;

- The rules which restrict the number and type of broadcast and other media outlets a single entity can own, including the multiple ownership rule, the duopoly rule and the one-to-a-market rule;

- The co-called "option time" rule as it is applied to stations in the Top 50 markets.

Each of these rules was adopted to address what the Commission perceived was the ability of networks and stations to "dominate" the national or local television marketplace, which the Commission feared would reduce competition and diversity of programming available to the public. But in the decades since these rules were first deemed necessary to achieving the Commission's policy goals, there has been an explosion of local and national video outlets and services, and a consequent dramatic increase in the viewing choices available to the public at the local and national levels. These revolutionary changes have totally altered the competitive standing of broadcast stations and networks relative to their newer competitors, such as cable. Regulations designed between 20 and 50 years ago to deal with broadcasting's "dominance" and to ensure competition and diversity are unnecessary anachronisms in the marketplace of the 1990's.

The Commission's mandate to regulate in the public interest requires a reexamination of its regulations in light of the sea change that has occurred in the television marketplace since these rules were adopted. There is no valid reason why the Commission should maintain restrictions that are no longer necessary to achieve its regulatory goals, particularly since they may actually work to undermine important policy objectives. The effect of these restrictions today is to unfairly hobble over-the-air broadcasting in its competitive struggle with cable, which can only ultimately lead to a weaker, less competitive broadcast industry, and a reduction in the diversity and quality of free over-the-air television service to the public.

The Commission's outdated rules prevent broadcasters from pursuing opportunities that are open to their cable competitors, who are not subject to these or any similar restrictions. These rules prevent broadcasters from finding ways to develop new sources of revenue to counter-balance cable's access to consumer subscription dollars. They prohibit television broadcasters alone from making synergistic investments in related media, and from forming alliances that would strengthen their broadcast operations. Television broadcasters are even prevented by some Commission regulations from running their station and network businesses with maximum efficiency and effectiveness in today's marketplace. There is no longer any factual or policy rationale for these discriminatory restrictions.

There is clear and overwhelming evidence that broadcast television -- which delivers unmatched and valuable local and national program services to the public -- is at risk without substantial and immediate regulatory relief. The stakes involved in this proceeding are extremely high: the ability of this nation's free over-the-air broadcast system to continue to provide every citizen, including those who do cannot or do not wish to pay for television, with high quality news, entertainment and sports programming throughout the broadcast day.

In light of the accelerating trends described by OPP and in these Comments, broadcasters cannot afford to wait for the conclusion of a lengthy or drawn out, multi-phased proceeding before regulatory relief is forthcoming. NBC strongly urges the Commission to "fast-track" this Inquiry and any subsequent rulemaking proceeding, so as to move as quickly as possible to eliminate or significantly modify the regulations that hobble the television broadcast industry and disserve the public interest.

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# COMMENTS OF NATIONAL BROADCASTING COMPANY, INC.

National Broadcasting Company, Inc., (NBC), by its attorneys, submits these Comments in response to the Commission's Notice of Inquiry (Notice) in the above-referenced proceeding.

## I. INTRODUCTION

This Inquiry was prompted by the Commission's "general concern that some of [its] television rules and policies may no longer be in step with current industry circumstances and, more particularly, by a number of apparent trends described in a recent Office of Plans and Policy (OPP) staff working paper on the status of the video marketplace." (Notice, ¶1). The rules and policies the Commission refers to were, for the most part, adopted decades ago, in a fundamentally different competitive era. Since that time, the changes in the marketplace, and in the competitive standing of television stations and networks relative to other video outlets, have been nothing short of revolutionary. Regulations designed in the 1940's, or even the 1960's, to deal with limitations on entry and concentration of economic control are total anachronisms in the 1990's marketplace. Today these unnecessary restrictions confine broadcasters in ways that were never envisioned and threaten the health of both networks and local stations. Such regulations include:

- The rule that prohibits national broadcast networks from owning cable systems;

- The rule that prohibits a single entity from operating more than one simultaneous over-the-air broadcast network;

- The rules which restrict the number and type of broadcast and other media outlets a single entity can own, including the multiple ownership rule, the duopoly rule and the one-to-a-market rule;

- The so-called "option time" rule as it applies to stations in the Top 50 markets.

These restrictions are no longer necessary to achieve the Commission's regulatory goals, and they may actually work to undermine those objectives. They prevent broadcasters from pursuing opportunities that are open to cable, their chief competitor, which is not subject to these restrictions; from finding ways to develop new sources of revenue to counter-balance cable's access to consumer subscription dollars; from making investments and forming alliances that would strengthen their broadcast operations; and from running their station and network businesses with maximum efficiency and effectiveness in today's marketplace. The result of these regulations is a weaker, less competitive broadcast industry, and a consequent diminution in diversity and service to the public.

The historical trends described in the OPP staff working paper are accurate and alarming. Moreover, in the few months since the OPP paper was issued, it has become apparent that the competitive disadvantages confronting broadcast television -- and especially network television -- are increasing at a substantially greater pace than OPP predicted less than six months ago. Even on the basis of its overly optimistic view of the relative competitive position of broadcasting in the 1990's, OPP recommended the elimination of Commission regulations that prevent networks and stations from competing against, and pursuing the same marketplace opportunities as, unregulated media. As 1991 unfolds, and the battle for audiences and revenues becomes more fierce, the need to eliminate these unfair and discriminatory restrictions has become increasingly urgent.

There is clear and overwhelming evidence that broadcast television -- which delivers unmatched and valuable local and national program services to the public -- is at risk without substantial and immediate regulatory relief. In light of the accelerating trends described by OPP and in these Comments, the nation's free over-the-air broadcast system cannot afford to wait for the conclusion of a lengthy or drawn out, multi-phased proceeding before regulatory relief is forthcoming. NBC strongly urges the Commission to "fast-track" this Inquiry and any subsequent rulemaking proceeding, so as to move as quickly as possible to eliminate or significantly modify the regulations that hobble the broadcast industry.

There is no question but that a reexamination of the structural and behavioral restrictions on television stations and networks is long overdue. The findings and recommendations of the OPP report present a critical challenge to this agency as the decade begins. The Commission has the opportunity in this proceeding to acknowledge the fundamental changes in the broadcast industry, and to craft a regulatory framework under which broadcasting can be maintained as a healthy and competitive medium that provides all viewers, including those who do not subscribe to cable, with high quality entertainment, news and sports programming. Alternatively, it may perpetuate unnecessary and outdated regulations that serve only to make it more difficult for broadcast stations and networks to compete with increasingly powerful unregulated viewing alternatives, and to continue to deliver their unique benefits to the public.

NBC hopes these Comments will assist the Commission in making the critical choices it faces. We will first review the legal and statutory predicates for Commission review of its existing regulations. Our Comments will then expand upon and update the competitive and marketplace trends described in the OPP staff working paper, and discuss the implications of those continuing trends for the future of broadcasting. Finally, NBC will discuss the specific regulations that should be eliminated or substantially modified in a rulemaking.

## II. THE COMMISSION MUST REEXAMINE ITS REGULATIONS IN LIGHT OF DRAMATIC CHANGES IN THE TELEVISION MARKETPLACE AND TO ENSURE THAT THEY FOSTER RATHER THAN HINDER REGULATORY AND STATUTORY GOALS

### A. The Commission's Regulation of Television Stations And Networks Should Be Reevaluated Against The Backdrop Of Today's Competitive Marketplace

> "[T]he Commission not only has the authority to reexamine long standing rules as circumstances change, but is virtually required to do so in order to ensure that it continues to regulate in the public interest." In re Amendment of the Commission's Rules Relating to Multiple Ownership, 100 FCC2d 17 (1984).

With these words, the Federal Communications Commission articulated its mandate, indeed its obligation, continually to reexamine its rules and policies in light of competitive and marketplace changes that affect the industries it regulates. The Communications Act grants the Commission "expansive" powers, and the breadth of the agency's regulatory discretion is predicated on Congressional recognition that the FCC needed the flexibility to modify its rules and policies as circumstances changed in the fluid and dynamic telecommunications industry. National Broadcasting Co., Inc. v. U.S., 319 U.S. 190, 219-20(1943).[1] In fact, so critical is the impact of changed circumstances on the validity of Commission regulations that it can be an abuse of discretion for the FCC to fail to take them into account. Geller v. FCC, 610 F.2d 973, 980 (D.C. Cir. 1979); See also United Steel Workers of America v. Marshall, 647 F.2d 1189, 1273 (D.C. Cir.

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[1] See also Office of Communication of United Church of Christ v. FCC, 707 F.2d 1413, 1425 (D.C. Cir. 1983)("Congress... vested this Commission with broad discretion precisely to facilitate such modifications of administrative policies in light of developments in the evolving broadcast industry); Computer and Communications, Etc. v. FCC, 693 F.2d 198, 213 (D.C. Cir. 1982)("[i]n designing the Communications Act, Congress sought 'to endow the Commission with sufficiently elastic powers such that it could readily accommodate dynamic new developments in the field of communications'").

1980), cert. denied, 453 U.S. 913 (1981) (an agency abuses its discretion if it fails to amend an existing rule when "the very predicate for the original rule and its statutory basis have disappeared.")

This nation's television stations and networks are currently burdened by many structural and behavioral regulations that the Commission adopted for radio almost 50 years ago. Other Commission rules were adopted after the advent of television, but have totally outlived any practical or policy basis they may have once had. These rules continue to restrict the business operations and opportunities of television stations and networks, even though the television industry has undergone sweeping and fundamental structural and competitive changes over the past five decades. Indeed, the changes this business has experienced in just the last few years have been of staggering proportions, including the proliferation of over-the-air television stations, the emergence of cable and original cable program services, the launch of the Fox Network and the growth of first-run syndication, consumer use of video cassette recorders, etc. The Commission is duty bound to reexamine its regulation of television stations and networks in light of these dramatic developments, "[i]ndeed, failure to do so could constitute less than adequate performance of [its] mission." In re Deregulation of Radio, 84 FCC2d 968, 969 (1981).

B. <u>The Commission Must Determine Whether Its Regulation of Television Broadcasting Continues To Further Regulatory and Statutory Goals, Including The Preservation Of Free Over-The-Air Broadcasting</u>

The Commission is also obliged to maintain a regulatory scheme that fosters both its own articulated policy goals and the over-arching goals of the Communications Act. If regulations fail to promote these regulatory and statutory goals, they may be at best unnecessary and at worst counterproductive.

Many of the Commission's regulations affecting the structure and business operations of television stations and networks are based on its stated desire to foster diversity and avoid undue concentrations of economic power. In today's fiercely competitive video marketplace, however, it is highly unlikely (if not impossible) for large concentrations of economic power to exist. Similarly, because of the vast number of competing video outlets, most of the structural regulation of television is clearly unnecessary to achieve diversity of programming or viewpoints.

The Commission must determine whether its television regulations are still necessary to achieve its goals of diversity and competition. NBC submits they are not. To the contrary, by restricting the ability of the over-the-air television industry to pursue business opportunities that are open to its unregulated competition, the Commission's rules may actually work to diminish competition and diversity in the video marketplace.

In addition, in light of the its statutory mandate, the Commission is obliged to evaluate the impact of its television regulations on the ability of over-the-air stations and networks to survive as healthy competitors in a multi-channel environment. The Communications Act envisions that the Commission will use its broad powers to ensure local over-the-air broadcast service is available to communities throughout the United States, and that the vast potential of broadcasting is promoted and realized for all citizens:[2]

> "The Commission has been charged with broad responsibilities for the orderly development of an appropriate system of local television broadcasting. The significance of its efforts scarcely can be exaggerated, for broadcasting is demonstrably a principal source of information and entertainment for a great part of the Nation's population." U.S. v. Southwestern Cable Co., 392 U.S. 157, 177 (1968).

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[2] 47 U.S.C. Sec. 307(b); National Broadcasting Company, Inc. v. FCC, supra, 319 U.S. at 219.

The vital role of television broadcasting in fulfilling Congressional goals under the Communications Act was recently reiterated in the Report of the Senate Commerce Committee on S.12, the "Cable Television Consumer Protection Act of 1991":

> "...America's system of broadcasting ... is a unique scheme that emphasizes responsiveness to the local community and places the broadcaster in the role of public trustee for the frequencies it is permitted to use. There is no doubt that, over the past forty years, television broadcasting has provided vital local service throughout its programming, including its news and public affairs offerings and its emergency broadcasts."[3] (S. Rep. No. 92, 102nd Cong. 1st Sess (1991), pp. 41-42).[3]

The local service of most individual television stations is complemented and supported by the broadcast networks, which are critical components of this country's unique national and local system of over-the-air broadcasting. The Commission itself has "noted on many occasions over the years the value of national network programming, and the contribution it makes to American television."[4] The "vital contributions which the

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[3] According to the Woodrow Wilson Center for Media Research, there has been approximately a three-fold increase in local television news programming in major markets since 1980. See, Statement of Chairman Alfred C. Sikes before the Subcommittee on Communications, Thursday, June 20, 1991.

[4] Prime Time Access Rule III, 50 FCC2d 829, 845 (1975).

networks have made to the development of the television medium"[5] have come "particularly in the areas of news and public affairs -- and [in] contributing to an informed citizenry."[6]

There is a growing concern that this nation's system of over-the-air broadcasting, envisioned by Congress and nurtured by the Commission for almost 60 years, is endangered -- that its viability is being threatened by fundamental changes in the advertising market, by an explosion of competitive sources of programming such as cable and home video, and by the burden of government regulations designed for another era. Consider, for example, the following observations:

> "Broadcasting has been eclipsed by cable" and the television networks are in a "slow-motion free fall."
>
> FCC Chairman Alfred C. Sikes, Broadcasting magazine, April 15 and July 8, 1991
>
> "We're clearly seeing the dawn of a new era and it doesn't look good for broadcasting."
>
> FCC Commissioner Ervin S. Duggan, Communications Daily, July 5, 1991

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[5] Notice of Inquiry in Docket No. 21409, 62 FCC2d 548, 550 (1977).

[6] Time-Life Broadcast, Inc., 33 FCC2d 548, 550 (1977).

There is "no question that free over-the-air television is in jeopardy."

Senator Daniel K. Inouye, Chairman, Senate Communications Subcommittee, Broadcasting magazine, March 11, 1991

"Network TV: an $8 Billion Nonprofit Institution"

Broadcasting magazine, July 8, 1991

These recent statements on the broadcasting business reflect the competitive and economic day-to-day reality for local television stations and the three broadcast networks. Their viewers, revenues and profitability are shrinking, not only because of the normal cycles of the television business, but because of fundamental changes in the competitive landscape that will not be reversed with an improvement in the economic climate. These changes and their effect on our industry are documented in the Staff Working Paper of the Commission's Office of Plans and Policy,[7] which prompted this Inquiry (Notice, ¶1), and concluded, inter alia:

"Broadcast television...has suffered an irreversible long-term decline in audience and revenue share, which will continue throughout the current decade" (OPP Paper, p. 159).

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[7] Office of Plans and Policy Working Paper #26. Broadcast Television in a Multichannel Marketplace, DA 91-817, 6 FCC Rcd 3996 (1991) (hereinafter "OPP Paper")

Given its statutory mandate and the importance of television broadcasting to the aims of the Communications Act, debilitating government regulations that bear no relationship to the marketplace dynamics of today, and unfairly restrict broadcasters' ability to compete against pay technologies with little or no local content, should be eliminated. As the OPP Paper notes, "[r]ules imposed to curb network or station market power or concentration of control over programming when television broadcasters _were_ the video marketplace may be counterproductive in today's competitive market" (p. 169). Thus, prompt reexamination and repeal of anachronistic regulations is critical to the maintenance of a competitive and healthy free over-the-air broadcast system.

* * *

It is clear that reexamination of the Commission's regulation of television broadcasting is sorely needed, indeed, required if the Commission is to fulfill its statutory mandate. A sea change has occurred in the marketplace since these rules were adopted -- a change which affects both the necessity for and the efficacy of regulation to achieve the Commission's policy goals.

## III. RESULTS OF AN NBC STUDY: THE VAST CHANGES THAT HAVE OCCURRED IN THE TELEVISION MARKETPLACE SINCE THE ADOPTION OF THE COMMISSION'S TELEVISION REGULATIONS HAVE DRAMATICALLY INCREASED COMPETITION, WHICH, IN TURN, HAS HAD A PROFOUND IMPACT ON THE FINANCIAL AND COMPETITIVE STRENGTH OF THE BROADCASTING BUSINESS

NBC undertook a special study of marketplace developments to update and expand on the OPP Paper. This Section of NBC's Comments reports on the findings of our study. The following data make clear that marketplace changes are occurring at a far greater pace than OPP predicted less than six months ago.

The OPP Paper documents the enormous changes that have rocked the television industry since 1975, describes the impact of those changes on local television stations, broadcast networks and viewers, and discusses the likely trends for the television industry for the next decade. The basic conclusions of the Paper are set forth in the Executive Summary:

> "Over the past fifteen years the range of broadcast, cable, and other video options available to the American viewer has increased dramatically. Broadcast television, however, has suffered an irreversible long-term decline in audience and revenue share, which will continue throughout the current decade...In the next ten years, broadcasters will face intensified competition as alternative media, financed not only by advertising but also by subscription revenues, and offering multiple channels of programming, expand their reach and their audience. Television broadcasting will be a smaller and far less profitable business in the year 2000 than it is now. Although broadcasting will remain an important component of the video mix, small-market stations, weak independents in larger markets, and UHF independents in general will find it particularly difficult to compete, and some are likely to go dark." (OPP Paper, p. vii).

NBC believes OPP's downbeat description of the television marketplace, and the increasing competition that characterizes that marketplace, accurately reflect the difficult reality our industry faces. Similar trend and competitive data were contained in many of NBC's filings in the Commission's recent proceeding on the Financial Interest and Syndication Rules (MM Docket 90-162).[8] OPP's gloomy forecast of the future of many television stations and the three broadcast networks is also all too realistic. But OPP may, in fact, have been overly confident of broadcasters' ability to withstand competition throughout the decade if deregulation is not forthcoming. As we will discuss below, the competitive situation faced by broadcast stations and networks has worsened even in the short time since the OPP Paper was issued. Moreover, as OPP itself points out, technological advances and/or the movement of substantial amounts of attractive programming from free to pay TV may hasten and exacerbate the downward trends of the past

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8 Joint Comments of Capital Cities/ABC, Inc., CBS Inc. and National Broadcasting Company, Inc., Vol. I, June 14, 1990; Supplemental Comments of National Broadcasting Company, Inc., June 14, 1990; Reply Comments of National Broadcasting Company, Inc., August 1, 1990.

decade.[9] Immediate regulatory relief is therefore critical.

The OPP Paper contains lengthy descriptions of marketplace changes and their impact on television broadcasters during the period 1975 through 1990. Rather than replicate or repeatedly cite with approval the marketplace data and trend analysis already contained in the OPP Paper or in the Commission's record of other proceedings, NBC will use these Comments to bring the Commission up to date on what has occurred in the increasingly competitive television marketplace in the nine short months since OPP finished collecting data for the bulk of its study. Taken together with the trends described in the OPP Paper, these recent data portray an industry trying to compete in an increasingly difficult marketplace, while saddled by outdated regulations that restrict its ability to pursue business opportunities.

## A. Increases In The Number of Video Outlets

In 1990 the average television household could receive 33

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9 p. 41, infra. See also, OPP Paper, pp. 167-69.

# MARKETPLACE CHANGES SINCE OPP PAPER

| | OPP 1990 Findings | Current |
|---|---|---|
| # Commercial Stations | 1,093 | 1,131 |
| % Homes Passed By Cable | 92% | 96% |
| Cable Penetration | 56% | 64% |
| Backyard Dishes | 2.7-3 million | 3.4 million |
| VCR Penetration | 69% | 73% |

| | OPP 1990 Estimate | 1990 Actual | 1991 Estimate |
|---|---|---|---|
| 3-Network Prime Time Shares (% of Viewing) | 64 | 61 (57%) | 59 (54.6%) |

| % Viewing | OPP 1989/90 Findings | 1990/91 Actual |
|---|---|---|
| 3-Network Daytime | 53% | 51% |
| Cable Prime Time | 20% | 22% |
| Cable All-Day | 32% | 34% |
| Cable All-Day (Cable Homes Only) | 45% | 48% |